United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4087

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & CO.,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
RAY GARRETT, JR., PHILIP A. LOOMIS, JR.,
JOHN R. EVANS, A. A. SOMMER, JR.,
GEORGE A. FITZSIMMONS,

Respondents.

On petition for review of an order of the Securities and Exchange Commission

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ANSWERING BRIEF OF RESPONDENTS

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ANSWERING BRIEF OF RESPONDENTS

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Were the sanctions imposed by the Commission in an administrative proceeding for revocation of a broker-dealer registration and a bar of his association with other broker-dealers appropriate, where a preliminary injunction upon which the order for proceedings was based had subsequently become permanent, where numerous violations of the

Commission's net capital rules as well as of the Commission's record-keeping and reporting requirements that were charged in the order for proceedings were found, and where the subject of the proceeding had demonstrated his continued disposition to disregard or defy the rules governing registration of broker-dealers?

2. Were the findings of violation supported by the record?

3. Was the subject of the proceeding afforded all his constitutional and statutory rights?

COUNTERSTATEMENT OF THE CASE

Introduction

This is a petition to review an order of the Securities and Exchange Commission, issued on April 28, 1975, that revoked the registration of Samuel H. Sloan & Co., a broker-dealer in securities, and barred its sole proprietor, Samuel H. Sloan, from being associated with any broker or dealer. The order was based upon the Commission's findings (a) that Sloan & Co. had willfully violated the recordkeeping, net capital and certain reporting requirements of the Securities Exchange Act of 1934, 15 U.S.C. 78a, et seq., and of certain rules promulgated by the Commission thereunder; and (b) that Mr. Sloan and Sloan & Co. had been permanently enjoined by the United States District Court for the Southern District of New York, in an enforcement action brought by the Commission, from further violations of the bookkeeping

and net capital requirements of the Securities Exchange Act and of rules promulgated thereunder. 1/

1/ Prior to June 4, 1975, the effective date of the Securities Acts Amendments of 1975, the Commission was authorized to impose remedial sanctions upon broker-dealers, and persons associated with broker-dealers, pursuant to subsections 15(b)(5) and (7) of the Securities Exchange Act, 15 U.S.C. 78o(b)(5) and (7). These provisions authorized the Commission to impose such sanctions after a hearing, if, inter alia, the Commission found it was in the public interest to do so.

In this regard, Section 15(b)(5) provided, inter alia, that the "Commission shall . . . suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds . . . that such broker or dealer . . . (C) is permanently or temporarily enjoined by . . . any court of competent jurisdiction . . . from engaging in or continuing any conduct or practice in connection with any . . . [activity as a broker or dealer or] (D) has willfully violated any provision of the . . . [Securities Exchange Act or of the rules promulgated by the Commission thereunder]."

Section 15(b)(7) contained a similar provision authorizing the Commission, among other things, to "censure any person, or bar or suspend for a period not exceeding twelve months any person from being associated with a broker or dealer if the Commission finds . . . that such person . . . is enjoined from any action, conduct, or practice . . . [in connection with any activity as a broker or dealer or has willfully violated any provision of the Securities Exchange Act or of the rules promulgated by the Commission thereunder]."

Comparable provisions are contained in subsections 15(b)(4) and (6) of the amended Securities Exchange Act, 15 U.S.C. 78o(b)(4) and (6).

The Commission commenced this proceeding on April 25, 1972, after the Commission's staff had conducted a series of inspections or examinations of books and records of Sloan & Co. during 1971 and January of 1972, by issuing an Order for Public Proceedings (App. 14-16).[2/] This order alleged that Sloan & Co., between May 10, 1970, and April 25, 1972, had willfully violated Sections 15(c)(3) and 17(a) of the Securities Exchange Act, 15 U.S.C. 78o(c)(3) and 78q(a), and the following rules promulgated thereunder: Rule 15c3-1, 17 CFR 240.15c3-1 (net capital rule); Rules 17a-3 and 17a-4, 17 CFR 240.17a-3 and 240.17a-4 (book and recordkeeping rules); Rule 17a-5, 17 CFR 240.17a-5 (rule requiring annual report of financial condition); Rule 17a-10, 17 CFR 240.17a-10 (rule requiring annual report of income and expenses); and Rule 17a-11, 17 CFR 240.17a-11 (rule requiring telegraphic notice of noncompliance with the net capital rule and a report of financial condition within 24 hours after such notice is given) (App. 14-15). The order also alleged that Mr. Sloan and Sloan & Co. had been preliminarily enjoined by the United States District Court for the Southern District of New York, on June 24, 1971, from conducting a business as a broker-dealer in securities at a time when Sloan & Co. was "not in compliance with Sections 15(c)(3) and 17(a) of the Exchange Act and Rules 15c3-1, 17a-3 and 17a-4

2/ "App. ___" refers to pages of the Appendix and the Supplemental Appendix filed herein. "R ___" refers to pages of the record of the administrative proceeding before the Commission.

thereunder"[3/] (App. 15).

The evidentiary hearing in the administrative proceeding was held on October 30, October 31 and November 1, 1972, and the administrative law judge rendered an initial decision on April 25, 1973 (App. 35-48), which set forth specific "Findings of Fact and Law" and determined that the public interest required revocation of Sloan & Co.'s registration and the barring of Mr. Sloan from association with any broker or dealer. Following a petition for review by the Commission of the initial decision, the Commission made an independent review of the record (App. 51 n.2) before issuing its opinion and order on April 28, 1975. Except that the Commission determined that there had been no violation of certain record preservation provisions (App. 52 n.6), and that the Commission found it unnecessary to determine whether certain disputed "net capital infractions" had occurred (App. 54), its findings generally paralleled those of the administrative law judge.[4/]

Recordkeeping Violations

The Commission found, as had the administrative law judge, "that registrant [Sloan & Co.] willfully violated the recordkeeping provisions

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3/ The Commission's enforcement action had been commenced on June 17, 1971, and subsequently led to the issuance of a permanent injunction, on January 7, 1974, enjoining Mr. Sloan and Sloan & Co. from further violations of the same provisions. Securities and Exchange Commission v. Sloan, 369 F. Supp. 996 (S.D. N.Y.). Mr. Sloan's appeal of the permanent injunction subsequently entered in that case was dismissed by this Court on January 7, 1976 (Docket No. 74-1436). An extension of time has been granted for the filing of a petition for certiorari in this case until September 10, 1976.

4/ Sloan d/b/a Samuel H. Sloan & Co., Securities Exchange Act Release No. 11376 (App. 51-59).

of Section 17(a) of the [Securities] Exchange Act and Rule 17a-3 thereunder . . ." by engaging in "extensive and persistent recordkeeping" violations during the first eight months of 1971 (App. 52-53). In this regard, the Commission found that the staff's initial inspection of the books and records of Sloan & Co. in January 1971 had

> "disclosed, among other things, that capital, income and expense items were not properly recorded in registrant's general ledger; that the stock record was not kept current; that there was no account record of bank balances; and that no trial balance had been prepared." (App. 52.) 5/

The Commission also found that Mr. Sloan had been asked in January 1971 to produce a trial balance and certain other data, but when he did furnish "something," "no capital computation could be made from what he submitted"; that a subsequent examination conducted on February 25, 1971, had "disclosed that the stock record and customer ledger were not up-to-date, and that the income and expense account was not properly maintained" and that a March 19 examination "revealed a capital contribution on the books of $58,175, when, in fact, no such contribution had been made" (App. 52-53). The Commission also found that on April 8, 1971, a Commission investigator returned to the offices of Sloan & Co., but was unable to conduct an examination (and compute a trial

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5/ The initial inspection and certain other inspections had been conducted by Arthur Bruder, who was a securities investigator then employed by the Commission's New York Regional Office (App. 60-61). Prior to his retirement in April 1971, Mr. Bruder had made a number of inspections of broker-dealers to determine whether they were in compliance with the Commission's net capital and recordkeeping rules (App. 60-63). In this connection petitioner (Br. 40) equates the fact that Mr. Bruder, who had been with the Commission 12 years, had audited "perhaps 50 brokerage firms" (App. 90) with Mr. Bruder's (continued)

balance) from the only records available-- certain debit and credit slips which a bookkeeping service used to prepare the firm's records; that during this visit, the investigator asked Mr. Sloan to provide a trial balance as of March 31, but the requested information was not received until April 19; that when the investigator, on May 6, returned to the offices of Sloan & Co. to verify the trial balance provided in April he could not do so because he "was unable to obtain the stock record and daily blotter"; and that when he was able to conduct an examination two days later, "he found the general ledger posted only through July 31" (App. 53). The Commission also found that certain computations of net capital during 1971 were not prepared "'currently at least once a month,'" as Rule 17a-3(11) required (App. 53).

Net Capital Violations

The Commission found that Sloan & Co. had willfully violated Section 15(c)(3) of the Securities Exchange Act and Rule 15c3-1 thereunder (App. 53-54). The administrative law judge had found that net capital deficiencies ranging from $718 to $70,064 existed on eleven separate

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5/ (continued)
"performing an average of four inspections per year." Of course, this ignores the fact that many of the 50 or so firms may have been repeatedly audited by Mr. Bruder over the 12-year period; indeed, as petitioner was aware, there were repeated inspections of Sloan & Co. over a period of several months.

Other inspections of Sloan & Co. were conducted by Sheldon Kanoff, who was also a securities investigator assigned to the Commission's New York Regional Office. At the time of the evidentiary hearing, he had been employed by the Commission for two years and, prior to becoming a member of the Commission's staff, had been employed for 16 years in the securities industry.

dates between January 18, 1971, and January 31, 1972 (App. 53). 6/

Noting that Mr. Sloan did not challenge these findings in his appeal to the Commission, but merely challenged the findings of the administrative law judge that he had engaged in business between July 28 and September 30, 1971 (App. 53-54), the Commission declared:

> "Sloan's own testimony shows that he engaged in the securities business . . . from January to July 28, 1971. And in January of 1972 he inserted quotations for various securities in the . . . [quotation listings] published by the National Quotation Bureau, Inc." (App. 54).

On this basis, the Commission determined that, in view of the net capital deficiencies established with respect to January, February, June and July of 1971 and January of 1972, Sloan & Co. had "clearly violated the Exchange Act's net capital requirements" during those months (App. 54).

Noncompliance with Reporting Requirements

The Commission also found that Sloan & Co. had willfully violated Section 17(a) of the Securities Exchange Act and Rules 17a-5 and 17a-10

6/ The findings of the administrative law judge with respect to net capital deficiencies are set forth below:

1971

January 18	$28,016
January 29	$11,912
February 26	$15,961
June 30	$19,222
July 31	$70,064
August 31	$15,789
September 30	$10,729
October 8	$ 7,545
November 30	$ 4,010
December 31	$ 4,557

1972

January 31	$ 718

promulgated thereunder by failing to file within the prescribed times a Rule 17a-5 report of financial condition for 1970 and a Rule 17a-10 report of income and expenses for the same year (App. 54-55). In addition, the Commission found that Sloan & Co. had willfully violated Rule 17a-11 by failing to give the Commission telegraphic notice of the firm's net capital deficiency on the day of its occurrence and by failing to file a report of financial condition with the Commission within 24 hours thereafter (App. 55 n.17).[7/]

The Permanent Injunction Entered Against Mr. Sloan and Sloan & Co.

The Commission also observed that the preliminary injunction entered against Mr. Sloan and Sloan & Co. in the Commission's enforcement proceeding, which was one of the bases for instituting this administrative proceeding, had "become permanent" and that the permanent injunction, "unlike the preliminary one, was entered after a trial" (App. 55). The Commission then noted that the district court had

> "found willful violations of our recordkeeping and net capital provisions, in a number of instances the same or substantially the same as those that we have found on the basis of the record before us. Those judicial findings show a continual pattern of recordkeeping and net capital violations including some between May 1973 and January 1974, a period subsequent to that involved in these proceedings." (App. 55.)

7/ Rule 17a-11 became effective on September 15, 1971. Accordingly, the Commission found Sloan & Co. had violated Rule 17a-11 by failing to give the Commission telegraphic notice of the January 1972 net capital deficiency and by failing to file a report of financial condition within 24 hours thereafter. The administrative law judge found that Sloan & Co. "never furnished any such notice or report." (App. 44-45, 55.)

Public Interest

In determining what sanctions were appropriate, the Commission considered the nature of the violations it had found on the basis of the record and the fact that the district court in the Commission's enforcement action had entered a permanent injunction against the respondents based upon violations of recordkeeping and net capital requirements, as set forth in the previous section. The Commission determined that these violations were "neither trivial nor technical. They involve flagrant and long-continued breaches of significant duties imposed on persons in the securities business." (App. 57).

The Commission also gave "some weight to the fact" that Mr. Sloan had been preliminarily enjoined, on January 17, 1975, in a second enforcement action brought by the Commission and that "[Mr.] Sloan's own papers in the second injunctive suit show his continuing disposition to disregard or defy the rules governing registered broker-dealers" (App. 57).[8/] In this regard, the Commission observed that Mr. Sloan "glories in having submitted 'more than 350' quotation applications 'in the face of an

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8/ In that action Mr. Sloan had been preliminarily enjoined from further violations of Section 15(c)(2) of the Securities Exchange Act, 15 U.S.C. 78o(c)(2), and Rule 15c2-11 promulgated thereunder, 17 CFR 240.15c2-11 (antimanipulative rule respecting publication of quotations). In addition, petitioner was affirmatively ordered to permit the Commission to conduct an immediate examination in an easily-accessible place of Sloan & Co.'s books and records, as required by Section 17(a) of the Act and Rule 17a-4 promulgated thereunder. Securities and Exchange Commission v. Sloan, S.D. N.Y., Docket No. 5729 (RJW). Mr. Sloan's appeal from the preliminary injunction was dismissed by this Court on January 7, 1976 (Docket No. 75-7056).

admonition by the S.E.C.'" that such submissions were in violation of Commission rules and that he had stated, in an affidavit filed in this Court, that he did "'not intend to comply with the . . . injunctive order'" (App. 57).[9/]

For these reasons, the Commission found, as had the administrative law judge, that it was in the public interest to revoke the broker-dealer registration of Sloan & Co. and "to bar Sloan himself from association with any broker or dealer" (App. 57).

9/ On September 3, 1975, Mr. Sloan was adjudged in civil contempt of the January 17, 1975, preliminary injunction. On May 10, 1976, an appeal from that order to this Court was dismissed in part and the rulings of the district court in all other respects were affirmed (Docket No. 75-6106).

ARGUMENT

I. THE SANCTIONS IMPOSED WERE APPROPRIATE AND BASED UPON A PROPER RECORD.

A. In the Light of the Commission's Findings, and the Injunctions Issued against Petitioner, the Commission's Determinations that It Was in the Public Interest To Revoke the Broker-Dealer Registration of Sloan & Co. and To Bar Mr. Sloan Himself from Association with any Broker or Dealer Clearly Were Proper.

The mere fact that petitioner had been enjoined from engaging in further violations of the recordkeeping and net capital requirements in an enforcement action brought by the Commission constitutes a statutory basis for the sanctions imposed. At the time the Commission issued its opinion, Sections 15(b)(5) and 15(b)(7) of the Securities Exchange Act, supra, p. 3, n.1, made clear that, upon a finding that the sanctions were required by the public interest, the preliminary injunction entered against Mr. Sloan and Sloan & Co. on January 24, 1971, and made permanent on January 7, 1974, would constitute an independent ground for the Commission's sanctions in this case, even aside from any separate Commission findings that Mr. Sloan and Sloan & Co. had engaged in violative conduct as alleged in the Order for Proceedings. The fact noted by the Commission that, after a trial on the merits, "the preliminary injunction on which this proceeding was initially based has now become permanent" (App. 55) removed the tentative nature of this basis for sanctioning petitioner. And in considering the public interest the Commission also properly gave weight to the subsequent injunction which had been entered against petitioner. Petitioner does not and cannot deny the existence of these injunctions, since they are matters of public record. And because Congress determined that the existence of an injunction was a legal

basis for the Commission to impose sanctions upon a broker-dealer, the Commission would have not lived up to its responsibilities had it ignored either the fact that the preliminary injunction referred to in the Order for Proceedings had been made permanent or the fact that the petitioner had again been enjoined in a subsequent Commission enforcement action.

Petitioner contends (Br. 94-96) that the Commission should have ignored the fact that the preliminary injunction had become permanent and the fact that a subsequent injunction had been issued, but his argument ignores the Commission's findings that Mr. Sloan and Sloan & Co. had engaged in violative conduct as charged in the Order for Proceedings sufficient to provide a legal basis to impose sanctions. Thus the Commission properly found, as we shall show, that the petitioner violated the recordkeeping, net capital and reporting requirements of the federal securities laws and certain Commission rules promulgated thereunder, as well as the fact that a preliminary injunction had been issued against Mr. Sloan and Sloan & Co. Having found a legal basis for imposing sanctions, the Commission properly considered, as it has pointed out in another case, "[d]emonstrated misconduct found in other proceedings before us, before the courts, or before the securities industry's self-regulatory bodies . . . ."[10/]

10/ International Shareholders Services Corporation, ___ S.E.C. ___ (June 8, 1976), SEC Docket Vol. 9, No. 16, 820, 826 n.19. As there pointed out, the Commission does not, in weighing the public interest, consider "[s]uspected misconduct that has never even been alleged, let alone found . . . ."

This Court and other courts "uniformly have recognized the fundamental principle that imposition of sanctions necessarily must be entrusted to the expertise of a regulatory commission such as the SEC; and only upon a showing of abuse of discretion--such as the imposition of a sanction unwarranted in law or without justification in fact--will a reviewing court intervene in the matter of sanctions."[11/]

The Commission determined (App. 57) that Mr. Sloan's violations were "neither trivial nor technical," referring, inter alia, to Blaise D'Antoni & Associates, Inc. v. Securities and Exchange Commission, 289 F. 2d 276, 277 (1961), where the Court of Appeals for the Fifth Circuit stated:

> "The net capital rule is one of the most important weapons in the Commission's arsenal to protect investors."

As the Commission noted, the violations here involved were "flagrant and long-continued breaches of significant duties imposed on persons in the securities business" (App. 57). And as the Commission noted, papers filed by Mr. Sloan in the second injunctive suit "show his continued disposition to disregard or defy the rules governing registered broker-dealers" (App. 57).

There is no merit to petitioner's assertion (Br. 104) that the bar against his association with any broker or dealer is a "more severe [remedy] than that permitted by statute." Section 15(b)(7) of the Act provided, as we have seen, that the Commission

> "may, after appropriate notice and opportunity for hearing, by order censure any person, or bar or suspend for

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11/ Hanly v. Securities and Exchange Commission, 415 F. 2d 589, 598 (C.A. 2, 1969); Tager v. Securities and Exchange Commission, 344 F. 2d 5, 8-9 (C.A. 2, 1965); Lawrence v. Securities and Exchange Commission, 398 F. 2d 276, 280 (C.A. 1, 1968); Associated Securities Corporation v. Securities and Exchange Commission, 293 F. 2d 738, 741 (C.A. 10, 1961); Pierce v. Securities and Exchange Commission, 239 F. 2d 160, 163 (C.A. 9, 1956).

> a period not exceeding twelve months any person from being associated with a broker or dealer if the Commission finds that such censure, barring, or suspension is in the public interest . . ." (emphasis supplied).

Petitioner urges that the words of the statute "for a period not exceeding twelve months" modifies "bar." If that were the case, it would be unnecessary for the statute to have alternatively used the word "suspend." This Court in other cases has upheld a comparable bar.[12/]

B. The Record Fully Justifies the Commission's Findings that Mr. Sloan and Sloan & Co. Violated the Recordkeeping, Net Capital, and Reporting Requirements.

1. These findings may not be challenged in this Court because Mr. Sloan failed to urge his objections before the Commission.

As we have seen, an administrative law judge found and the Commission found, after an independent review of the record, willful violations by Sloan & Co. of the Commission's recordkeeping, net capital, and reporting requirements. Petitioner contends that various of these findings are not supported by substantial evidence, including certain findings that he has specifically admitted in his testimony. See, e.g., page 26, infra.

Petitioner ignores the provision of Section 25(a) of the Securities Exchange Act, which read at the time he sought review in this Court:

12/ See, e.g., Hanly v. Securities and Exchange Commission, supra, 415 F. 2d at 597-598; Fink v. Securities and Exchange Commission, 417 F. 2d 1058, 1059-1060 (C.A. 2, 1969).

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission." 13/

Despite the fact that substantially all the specific findings of the Commission that petitioner now complains of (Br. 31-94) had been made by the administrative law judge, 14/ petitioner did not urge before the Commission the arguments now being made to this Court with respect to the question of substantial evidence. Certain of these arguments had been made to the administrative law judge, prior to issuance of the initial decision, by Mr. Sloan's counsel in petitioner's brief in support of his Proposed Findings of Fact and Conclusions of Law (R 1118-1122, 1126-1127). But the Commission's Rules of Practice provide at 17 CFR 201.17(a):

> "Any objection to an initial decision not saved by written exception filed pursuant to this rule will be deemed to have been abandoned and may be disregarded." 15/

13/ This was the effective provision on May 7, 1975, when the petition for review was filed. The provision in the Act after the 1975 Amendments, which became effective June 4, 1975, is contained in Section 25(c)(1) of the Act, 15 U.S.C. 78y(c)(1), and reads as follows:

> "No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so."

The petitioner here has shown no reasonable ground for failing to make the required objections.

14/ Compare App. 37-45 with App. 52-54.

15/ Quoted in the text is the last sentence of this rule. The preceding material reads as follows (emphasis supplied):

> "Any person who seeks Commission review of an initial decision by a hearing officer shall, within 15 days after service of such initial decision, serve and file a petition for Commission review containing exceptions thereto indicating specifically the findings and conclusions as to which exceptions are taken together with supporting reasons for such exceptions. These reasons may be stated in summary form."

Accordingly, this Court should not consider the objections the petitioner now makes to the Commission's findings because he did not make them to the Commission.[16/]

Except for the very general statement that "[t]he finding that respondent willfully violated the Commission's Rules involved is clearly erroneous and against the weight of evidence" (App. 404), nowhere in the petition for review of the initial decision of the administrative law judge (App. 404-406) does petitioner bring to the Commission's attention the matters of which he complains here. No oral argument was had in this case before the Commission, and the only brief filed on petitioner's behalf in the appeal from the administrative law judge's decision, Memorandum in Behalf of Respondent (App. 409-420), did not raise any of the issues with regard to the facts that petitioner is making to this Court. That document, except for a few paragraphs dealing generally with "willful misconduct" and "settlement" (concerning an alleged offer of settlement that had been made to petitioner), dealt primarily with the issue whether respondent was doing business in the period after July 28, 1971, when petitioner, by his own admission (App. 375, 376), did not meet the Commission's net capital requirements.

The Commission's decision was made on the assumption that it did not need to determine whether the administrative law judge had correctly found that Sloan & Co. was doing business from the end of July to

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16/ Compare Gross v. Securities and Exchange Commission, 418 F. 2d 103, 108 (C.A. 2, 1969), where this Court said:

> "We agree with the Commission that '[p]ublic policy considerations favor the expeditious disposition of litigation, and a respondent cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action.'"

September (App. 54 n.15). For the purpose of its decision, it assumed that Sloan & Co. was not doing business during that period, but that there were sufficient violations of the net capital rule during the period when petitioner was concededly doing business (App. 54).

Wholly apart from Section 25(a) of the Act, if the Commission relied on concessions of petitioner that petitioner now suggests he did not make (see, e.g., Br. 87), it should be noted that he filed no petition for rehearing with the Commission to correct the alleged errors.

2. The findings were supported by substantial evidence.

At the time the Commission entered the order which is the subject of review, Section 25(a) of the Securities Exchange Act, 15 U.S.C. 78y(a), provided, inter alia: "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."[17/] At the evidentiary hearing, two of the Commission's broker-dealer inspectors testified at length with respect to specific occasions on which they examined the books and records of Sloan & Co. and observed that they were not maintained in conformity with Commission rules (see, e.g., App. 64-65, 67, 86-87). The inspectors also testified, supported by exhibits with

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17/ Section 25(a)(4) of the amended Securities Exchange Act, 15 U.S.C. 78y(a)(4), similarly provides: "The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive."

As the Supreme Court stated in Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 477 (1951), the term "substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"

respect to specific instances, that Sloan & Co. was found to have net capital deficiencies (see, e.g., App. 69-71, 73-74, 82-83, 133-134, 180-194). As the administrative law judge made clear, his findings were based not only on the testimony of these two Commission inspectors but also upon exhibits and admissions in the testimony of Mr. Sloan himself (App. 39, 44).

It is true that one of the Commission's inspectors, Mr. Bruder, sometimes appeared to be confused during the cross-examination. At the time of the hearing Mr. Bruder was retired and the events involved had occurred more than a year and a half earlier. Moreover, it appeared from Mr. Sloan's previous testimony in a Commission investigation that there would be few questions as to the underlying facts, so that it is possible that Mr. Bruder may not have prepared for cross-examination as carefully as he would have had he not been aware of Mr. Sloan's previous admissions. While petitioner's brief (see, e.g., pp. 26, 32, 34, 39-41) criticizes Mr. Bruder's imprecision, it was more than matched by Mr. Sloan's own testimony which, as to matters with which he was presumably familiar, is replete with phrases such as "I'm not sure" (App. 297), "I'm not really sure" (App. 299), "I don't recall exactly" (App. 330), "I have no idea" (App. 302), and "I couldn't recall" (App. 299). Moreover, the criticisms of Mr. Bruder are highly exaggerated. As Judge Tracy, the administrative law judge who heard and saw the witnesses, stated: "[A] careful review of [the Commission investigators'] testimony, together with some 19 supporting exhibits, plus observation of their demeanor, leads to the conclusion that rather than being incredible [, as petitioner had argued,] their testimony was credible and worthy of belief" (App. 39).

Typical of petitioner's criticism of Mr. Bruder is the alleged inconsistency of his testimony as to Sloan & Co.'s general ledger. The brief at page 38 states that Mr. Bruder testified on direct examination that the general ledger accounts "were not maintained," which petitioner then equates to mean "Sloan did not have a general ledger." On cross-examination the brief (p. 38) says that Mr. Bruder "changed his mind," because in answer to the question "[Y]ou said that they did not have a general ledger, is that correct"; he answered, "I said the general ledger, I believe, was not properly maintained." In attempting to draw a contradiction between Mr. Bruder's "not maintained" and his "not properly maintained" statements, Mr. Sloan's brief does not give Mr. Bruder the benefit of the possibility that the "reporter made a mistake in taking down the question" (App. 315), an explanation Mr. Sloan relied upon to explain his own testimony of a much more contradictory nature (App. 312-315).

Petitioner's arguments to the effect that the findings are unsupported by the evidence, on analysis, generally turn out to be at best quibbles and at worst misleading. Thus, with respect to the record-keeping violations, the Commission found, for example, on the basis of Mr. Bruder's testimony (App. 96), that Sloan & Co.'s stock record was not current at the time of his initial inspection. Petitioner's brief did not cite any evidence in the record which demonstrates that the stock record was in fact kept current, and Mr. Sloan, who testified in the proceeding, did not so testify. The brief (p. 41) merely observes that Mr. Bruder could not recall "how far behind" Sloan & Co. was in making entries in the stock record. Also, by asserting that

Mr. Bruder's testimony was inconsistent with his later statement (App. 105) that he did not examine the stock record during a visit to the offices of Sloan & Co. in the latter part of January, petitioner gives the impression (Br. 41-42) that Mr. Bruder had not even examined the stock record on his first visit. He fails to disclose that the later statement referred, not to Mr. Bruder's initial inspection of Sloan & Co., which was the subject of his testimony that the stock record was not kept current, but to a subsequent examination Mr. Bruder conducted after the Commission's staff had received certain data it had requested from petitioner following the initial inspection. (App. 64-65, 72-74, 105.)

Petitioner's brief also fails to dispute the substance of Mr. Bruder's testimony that no trial balance had been prepared at the time of the initial inspection (App. 64) and that, when Mr. Sloan did subsequently provide "something" at the staff's request (App. 67), no capital computation could be made from what he submitted.[18/] Rather than refute this testimony, petitioner's brief points to minor inconsistencies in the record as to when and how the trial balance was requested, when it was received and whether it was received (Br. 25-26, 32, 43)[19/] and suggests that Mr. Sloan's failure to supply an adequate trial balance in January was somehow of no consequence because Mr. Bruder was able to make his <u>own</u> capital computation during a subsequent visit to the offices of Sloan & Co. (Br. 44).

18/ Mr. Bruder testified that no capital computation could be made from the data submitted because there was no inventory of securities held long and short and no inventory of fails to deliver and fails to receive (App. 70-71, 125-126).

19/ In the latter regard, Mr. Sloan concurs with Mr. Bruder's testimony (App. 67) that a document was submitted to the staff that purported to be a trial balance (Br. 43).

Similarly, petitioner makes no effort to disprove the substance of Mr. Bruder's testimony that, on February 25, 1971, the customer ledger of Sloan & Co. was not up to date and the firm's income and expense account was not properly maintained (App. 86-87). Instead, his attack is confined to (a) questioning the date on which the February examination was conducted, while admitting that such an examination did take place (Br. 32-33, 45); (b) asserting that the testimony of Mr. Bruder does not constitute substantial evidence (Br. 34, 46); and (c) suggesting that Mr. Bruder said "he was confused" with respect to what he observed at the time of the February examination (Br. 33), when it is apparent from the testimony cited that Mr. Bruder had merely asked Mr. Sloan's attorney to clarify which exhibit was the subject of certain questions propounded during cross-examination (App. 123-124).

Nor does petitioner successfully undercut the Commission's finding that a March 19, 1971, examination of the books and records of Sloan & Co. "revealed a capital computation on the books of $58,175 when, in fact, no such contribution had been made" (App. 53). This finding was based on the testimony of Mr. Kanoff that the books and records of Sloan & Co. "reflected" such a contribution, that the $58,175 represented funds deposited by a Mr. Iny for the purchase of Kaiser Steel securities and that Mr. Iny was in fact a customer of the firm rather than a capital contributor (App. 134-135, 206, 273, 293). The Commission's finding is substantiated by Mr. Sloan's own testimony that Mr. Iny had deposited certain funds with Sloan & Co. pursuant to a tentative partnership agreement and that, although no partnership agreement was ever signed, the books and records of Sloan

& Co. nevertheless treated these funds as capital in February, 1971 (App. 344-345). In the face of this testimony, Mr. Sloan merely asserts that the Commission's finding "has no basis" (Br. 46) and then proceeds to discuss tangential matters (Br. 46-48).[20/] The Commission's finding is also consistent with the testimony of Mr. Iny, who testified that (a) he never signed a partnership agreement with Mr. Sloan and never contributed any cash or securities to the capital account of Sloan & Co. (App. 348); (b) Mr. Sloan purchased Kaiser Steel securities for him (App. 362); and (c) he had received the securities purchased in those transactions and was satisfied with Mr. Sloan's "activity as a broker . . ." on his behalf (App. 362-363).

Petitioner also attempts to challenge the Commission's finding that Mr. Kanoff was unable to conduct an examination (and compute a trial balance) on April 8, 1971, because the only records available were certain debit and credit slips which a bookkeeping service used to prepare the firm's records (App. 53, 136, 220-222). Mr. Kanoff testified that he was unable to extract a trial balance on that date because there was no record of prior balances, and that, accordingly, he asked Mr. Sloan to provide a trial balance (App. 136-137). The substance of petitioner's argument is that the debit and credit slips did provide an adequate means for conducting an inspection of Sloan & Co.'s books and records (Br. 49), but he does not even attempt to explain why, if this were so, he was unable to provide a trial balance

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20/ These matters include the effect of Mr. Kanoff's determination upon his computation of Sloan & Co.'s net capital as of February 26, 1971, and his valuation of 2,000 shares of Kaiser Steel securities in making that computation.

until April 19, eleven days after Mr. Kanoff had requested that a trial balance be supplied.

The Commission also found that computations of net capital were not "'prepared currently at least once a month'" during 1971 as Rule 17a-3(11) required (App. 53). Mr. Sloan admitted in his testimony at the hearing that there were some months in 1971 when he had "not done a capital computation" and that he subsequently "made all the capital computations that were missing" (App. 331-333). His argument with respect to this finding (Br. 63-66) misconstrues the Commission's finding as a determination that Sloan & Co. did not prepare "any" capital computations for 1971 and completely ignores his own testimony.

Respecting Sloan & Co.'s net capital violations, the Commission noted with respect to the eleven dates the administrative law judge found that there were net capital deficiencies (see page 8, n.6, supra), the "respondent does not challenge these findings" (App. 53). While petitioner contends that he did not violate the net capital rule on several of the dates because he claims he was not then engaged in the securities business, the Commission pointed out that "Sloan's own testimony showed that he engaged in the securities business in the usual unrestricted sense from January to July 28, 1971," and that "in January of 1972 he inserted quotations for various securities in the sheets published by the National Quotation Bureau, Inc." (App. 54). In this regard, the Commission pointed out that Section 15(c)(3) prohibits a broker-dealer "not only from effecting transactions, but from attempting to induce them" in contravention of the Commission's rules (App. 54, n.13), and that, accordingly, "a securities

dealer whose net capital is deficient is barred from inserting quotations in the sheets" (App. 54). The Commission therefore determined, without reaching the question of whether Sloan & Co. engaged in business during this period after July 28, that Sloan & Co. had "clearly violated the Exchange Act's net capital requirements during January, February, June and July of 1971 and January of 1972. (App. 54).[21/]

Petitioner's brief (pp. 68-77, 86) argues at great length that the findings of the Commission and the administrative law judge are based on inaccurate capital computations, that the capital computations introduced into evidence are "hearsay" and therefore "not competent under the common law rules of evidence," and that "none of the capital computations" prepared by Mr. Kanoff have "any probative value." But most, if not all of the capital computations involved were admitted into evidence without any objection being made by Mr. Sloan's counsel, an individual who also served at times as Mr. Sloan's accountant (see, e.g., App. 72-75, 83-84, 133-134, 180-194). In addition, Mr. Sloan's counsel and Commission staff members made adjustments or corrections in certain

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21/ Petitioner's brief suggests (p. 87) that the Commission's finding that Sloan & Co. violated the net capital requirements in July was "an oversight" (Br. 87) because the administrative law judge found that a net capital deficiency existed as of July 31 and the Commission found that Sloan & Co. engaged in business through July 28 without reaching the question of whether Sloan and Co. continued doing business after that date. Mr. Sloan admitted at the hearing, however, that Sloan & Co. "was not in compliance with the capital requirement" on July 28, and in fact had "a capital deficiency" on that day. (App. 375, 376.) Even aside from Mr. Sloan's testimony, the Commission could have inferred that Sloan & Co. violated the net capital requirements during July, at times when the firm was admittedly doing business (App. 297), based on the prior net capital deficiencies found, the existence of a $70,064 deficit on July 31 and the absence of any evidence in the record to suggest that no deficit had existed three or more days earlier.

of the computations and the document reflecting these adjustments or corrections, Division Exhibit 16, was also introduced into evidence without objection (see, e.g., App. 185-194).

As to the reporting violations, petitioner contends (Br. 89) that "the record . . . contains no evidence . . ." that Sloan & Co. violated Section 17(a) of the of the Securities and Exchange Act and Rules 17a-5 and 17a-10 promulgated thereunder by failing to file within the prescribed times a Rule 17a-5 report of financial condition for 1970 and a Rule 17a-10 report of income and expenses for the same year. But the answer filed in this proceeding admits the allegations in the Order for Proceedings that these documents were not timely filed (App. 400-401). Petitioner also disregards his own testimony that a Rule 17a-5 report, which was required to be filed by November 1970, was not filed by January 15, 1971 (App. 54, 334).[22/]

22/ Petitioner states (Br. 89-90) that "during the course of the administrative hearing, the attorney for the S.E.C. disavowed any allegation that there was a failure by Sloan to file his 1970 X-17A-5 report (A 387)," and that, in addition, one of the Commission's securities investigators testified that his understanding was "that the 1970 late filing or non-filing was not going to be an issue (A 269) and that [he thought] 'the entire situation with the Sloan firm was hinging upon his capital position . . .' (A 270)."

The Commission's formal notice of hearing, however, includes the charge:

> "During the period from on or about October 10, 1970 to March 5, 1971, Sloan & Co. willfully violated Section 17(a) of the Exchange Act and Rule 17a-5 thereunder, in that Sloan & Co. failed to file a report of its financial condition with the Commission for the calendar year 1970 within the time specified by said Rule."

(continued)

Petitioner also makes a convoluted argument (Br. 78-84, 88-89) that various of the violations found by the Commission could not have been "willful." As the Commission pointed out (App. 54, n.14), this Court and other courts have long recognized that violative conduct is "willful," as that term is used in Section 15(b) of the Securities Exchange Act, when the actor intends to do the act which constitutes the violation, even if he does not specifically intend to violate the law. See e.g. Tager v. Securities and Exchange Commission, 344 F.2d 5, 8 (C.A. 2, 1965); Gearhart & Otis, Inc. v. Securities and Exchange Commission, 348 F.2d 798, 802-803 (C.A. D.C., 1965).

II. PETITIONER'S ARGUMENTS THAT IT WAS NOT AFFORDED ALL RELEVANT CONSTITUTIONAL AND STATUTORY RIGHTS ARE WITHOUT MERIT.

A. The Statutory Provisions and Rules Challenged are Constitutional.

On at least eleven occasions of which we are aware this Court has considered various challenges to the constitutionality of the Securities Exchange Act and rules promulgated thereunder. In each

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22/ (continued)

The pages referred to in petitioner's brief show merely that Commission counsel objected to questions which he considered repetitive to explain why the report was filed late and stated, in that regard, "[t]here's no allegation that Mr. Sloan has not filed the X-17A-5 report for 1970" (App. 387). He was, of course, speaking as of the time of the hearing on November 1, 1972. In addition, the securities investigator testified merely that at a time presumably before the institution of the proceeding, it was his "understanding . . ." that "the 1970 late filing or non-filing was not going to be made an issue" but that this was only his "own opinion." (App. 269-270.)

case the constitutionality of the challenged provisions has been sustained. 23/

In the most recent of these cases, this Court considered an action brought by Mr. Sloan, which sought, inter alia, to have the Securities Exchange Act, and all of the rules promulgated thereunder, declared unconstitutional Sloan v. Securities and Exchange Commission, et al., C.A. 2, Docket No. 75-7203. This Court there held, in affirming the district court's dismissal of the complaint, that Mr. Sloan's "massive though diffuse attack" on "the entire structure of securities regulation in the United States" was "frivolous." Slip Op. at 2380. In addition, noting that certain of the same constitutional claims had been raised by Mr. Sloan in an earlier appeal, the court's opinion declared (id.):

> "We then characterized his 'blunderbuss attack' as 'frivolous' . . . . We adhere to that view." 24/

23/ Sloan v. Securities and Exchange Commission, et al., (C.A. 2, Docket No. 75-7203, March 4, 1976, amended April 16, 1976), rehearing denied, April 16, 1976, petition for writ of certiorari filed July 14, 1976; Sloan v. Securities and Exchange Commission, 527 F. 2d 11 (C.A. 2, 1975), certiorari denied, ___ U.S. ___ (No. 75-1507); United States v. Persky, CCH Fed. Sec. L. Rep. ¶95,209, C.A. 2, June 18, 1975; United States v. Guterma, 281 F. 2d 742 (C.A. 2), certiorari denied, 364 U.S. 871 (1960); Securities and Exchange Commission, v. May, 229 F. 2d 123 (C.A. 2, 1956); Gratz v. Claughton, 187 F. 2d 46 (C.A. 2), certiorari denied, 341 U.S. 920 (1951); Park & Tilford, Inc. v. Schulte, 160 F. 2d 984 (C.A. 2), certiorari denied, 332 U.S. 761 (1947); United States v. Minuse, 142 F. 2d 388 (C.A. 2), certiorari denied, 323 U.S. 716 (1944); Charles Hughes & Co., Inc. v. Securities and Exchange Commission, 139 F. 2d 434 (C.A. 2, 1943), certiorari denied, 321 U.S. 786 (1944); Smolowe v. Delendo Corp., 136 F. 2d 231 (C.A. 2), certiorari denied, 320 U.S. 751 (1943); Wright v. Securities and Exchange Commission, 112 F. 2d 89 (C.A. 2, 1940).

24/ The earlier appeal was Sloan v. Securities and Exchange Commission, 527 F. 2d 11, supra n.23.

In addition, this Court specifically held that the Securities and Exchange Act and the Commission rules challenged by Mr. Sloan, including two of the rules under attack here, Rules 15c3-1 and 17a-5 (Br. 109-110), "are valid and reasonable exercises of congressional power under the commerce clause and the SEC's delegated regulatory power, which infringe no constitutional rights of plaintiff." Slip Op. at 2380.

Nevertheless, petitioner returns to the attack, asserting (Br. 108-110) that Rules 15c3-1, 17a-3, 17a-5, 17a-10 and 17a-11 are "unconstitutional facially and as applied." Petitioner's current argument that Rule 15c3-1 is unconstitutional (Br. 82-83, 109) appears to be based on a contention that there might be periods between a trade and settlement date in the purchase or sale of securities when, because of market fluctuations, it might be difficult for a broker-dealer to know whether he was in compliance with the capital requirements. The short answer is that investors dealing with a broker-dealer must be protected and there is no constitutional provision that precludes the Commission, in accordance with the congressional mandate, from requiring that the broker dealer must be in a sufficiently liquid capital position to eliminate the danger that he might not be able to pay his customers whenever they might demand what is owed them. 25/

25/ Petitioner claims that Rule 15c3-1 does not adequately inform broker-dealers of what conduct might violate the rule. He argues in this regard that because of the market fluctuations that may occur between the trade date and the settlement date, and because a broker is required to carry securities sold as part of his capital position until settlement is made, "there is no way that a broker in Sloan's position can ever know a particular transaction is legal at the time he makes the transaction" (Br. 83). This argument ignores the fact that a broker can use "trade date" accounting rather than the "settlement date" accounting used by Sloan & Co., in which case this problem will not arise. But even a broker using "settlement date" accounting knows that securities he has sold are to be

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Mr. Sloan also claims that the statutory requirement that brokers and dealers register with the Commission[26/] "deprives" him "of his constitutional rights" (Br. 12). He asserts, in this regard, that the requirement creates "a special class of persons . . . who are apparently considered 'inherently suspect of criminal activities' . . ." and argues that, under Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965), "such an arrangement is unconstitutional" (Br. 12-13). But Albertson is not even arguably applicable here. Petitioners there had been ordered to register with the Subversive Activities Control Board as members of the Communist Party and to submit a registration statement at a time when an admission of membership in the party could be used as evidence in a criminal prosecution brought under either the Smith Act or the Subversive Activities Control Act. The Supreme Court held, under those circumstances, that the registration requirement violated petitioners' Fifth Amendment rights against self-incrimination, declaring, 382 U.S. at 79:

> "the pervasive effect of the information called for is incriminatory . . . . [T]he questions . . . are directed at a highly selective group inherently suspect of criminal activities."

In so holding, however, the Supreme Court distinguished the registration

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25/ (continued)
included in his capital position until the settlement date, and he may make a capital computation at any time market fluctuations are of sufficient magnitude to raise a question as to his compliance with the rule.

26/ Broker and dealers are required to register with the Commission pursuant to Sections 15(a) and 15(b) of the Securities Exchange Act, 15 U.S.C. 78o(a) and (b).

requirement for Communist Party members from "an essentially noncriminal and regulatory area . . . ." Brokers and dealers are not "a highly selective group inherently suspect of criminal activities," and, despite the fact that the Securities Exchange Act contains criminal penalties for willful violations,[27/] the statute is essentially regulatory.

Mr. Sloan also contends that Rule 17a-3 violates his Fifth Amendment guarantee against self-incrimination, apparently by requiring him to maintain certain books and records that may reflect noncompliance with certain unspecified provisions of the Securities Exchange Act and Commission rules promulgated thereunder (Br. 13, 110). In addition, he asserts that Rules 17a-5 and 17a-11 violate the same guarantee because a Rule 17a-5 report of financial condition may reveal that a broker is in violation of the net capital rule and the telegraphic notice required by Rule 17a-11 is intended to advise the Commission of noncompliance with the financial responsibility requirements. These claims also appear to rest on the premise that broker-dealers are a class "inherently suspect of criminal activities," since the cases principally relied upon by Mr. Sloan in support of this argument (Br. 94, 108-110) were decided upon the ground that the various requirements involved applied to select "group[s] inherently suspect of criminal activities."[28/] In contrast, the recordkeeping

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27/ Section 32, 15 U.S.C. 78ff.

28/ Marchetti v. United States, 390 U.S. 39, 47 (1968), and Grosso v. United States, 390 U.S. 62, 68 (1968), involved disclosure of wagering activities which might subject the persons involved to prosecution under a myriad of state or federal laws; Haynes v. United States, 390 U.S. 85, 96 (1968), involved a provision of the National Firearms Act that would have required registration of certain kinds of firearms which may have disclosed that they were obtained without complying with other provisions of the Act; Leary v. United States, 395 U.S. 6, 16 (1969), required (continued)

and reporting requirements challenged by petitioner are not designed primarily to ferret out criminal wrongdoing, but to ensure that broker-dealers have adequate records to conduct their business properly and to provide a means of determining whether they are in compliance with the financial responsibility requirements and other protections for investors established by Congress and the Commission.

In a related argument, petitioner asserts in conclusory terms (Br. 109) that Rule 17a-3 is unconstitutional because it "undermines" the "required records" doctrine stated in Shapiro v. United States, 335 U.S. 1 (1948). Shapiro specifically held, however, 335 U.S. at 33, that where, as here, a person may engage in a regulated activity "solely by virtue of the license granted to him under the statute," the Fifth Amendment does not apply:

> "[T]he privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'"

Petitioner, in contending that Commission investigators "have been given unlimited access to Sloan's office and have been allowed to rummage through his papers at will" (Br. 100), and, hence, violated his Fourth Amendment rights, apparently is arguing that Section 17(a) is unconstitutional. That section provided that records required to be kept by a

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28/ (continued)
disclosure of possession of marijuana in violation of various state laws and the federal Marijuana Tax Act. The persons in the foregoing cases were appealing from criminal convictions; Mr. Sloan admits (Br. 14) that "no criminal proceedings have been brought against him."

broker-dealer "shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors."[29/] There is certainly nothing in the record to show, nor did Sloan contend to the Commission, that the examinations conducted were not reasonable.

Petitioner suggests various other equally frivolous arguments respecting the constitutionality of the Commission's rules: that "all the rules in question here were promulgated in an unconstitutional exercise of legislative power by an administrative agency" (Br. 110); that they unconstitutionally abridged "the constitutional right . . . to follow a chosen profession free from unreasonable governmental interference . . ." (Br. 108); and that Rule 17a-10, which is used by the Commission for statistical purposes necessary in connection with the Commission's regulation of broker-dealers, is unconstitutional because the information required allegedly has no purpose "other than general vexatiousness . . ." (Br. 109).

B. The Commission Properly Refused To Permit Mr. Sloan To Withdraw the Broker-Dealer Registration of Sloan & Co.

Mr. Sloan contends (Br. 11-12) that the Commission violated his constitutional rights by refusing to permit withdrawal of the broker-dealer registration of Sloan & Co., which had been filed pursuant to Section 15(b)

29/ The quotation in the text is from the statute as it read prior to the Securities Acts Amendments of 1975. Comparable provisions are now contained in Section 17(b) of the Act.

of the Securities Exchange Act, citing as authority for that proposition Jones v. Securities and Exchange Commission, 298 U.S. 1 (1936). Jones held that a registration statement filed under the Securities Act of 1933 could be withdrawn before its effective date as a matter of right. Justice Cardozo, with Justices Brandeis and Stone joining in his dissenting opinion, stated, 298 U.S. at 32:

> "To permit an offending registrant to stifle an inquiry by precipitate retreat on the eve of his exposure is to give immunity to guilt; to encourage falsehood and evasion; to invite the cunning and the unscrupulous to gamble with detection . . . [and to make the] statute and its sanctions become the sport of clever knaves."

Even aside from the question whether Jones still has vitality in the context of the Securities Act,[30/] the Court of Appeals for the Fifth Circuit has distinguished Jones in the course of holding that companies have "no absolute right to withdraw" an application for registration as a broker or dealer under the Securities Exchange Act. Peoples Securities Co. v. Securities and Exchange Commission, 289 F. 2d 268 (C.A. 5, 1961); accord Blaise D'Antoni & Associates, Inc. v. Securities and Exchange Commission, supra, 290 F. 2d 688. In the Peoples Securities case, 289 F. 2d at 275, the court pointed out that to countenance an absolute right of withdrawal in the context of the Securities Exchange Act would "nullify the effectiveness of the entire regulatory scheme designed to protect investors against injury at the hands of persons guilty of misconduct under the securities laws." The Court there observed, in addition, that "important consequences"

30/ The Fifth Circuit has observed, for example: "Knaves in the securities business have found that the shifting sands of legislation and judicial interpretation have made Jones a shrinking oasis in a large desert." Peoples Securities Co. v. Securities and Exchange Commission, 289 F. 2d 268, 272 (C.A. 5, 1961).

attach to administrative findings of willful violations; that broker-dealer firms, and their officials and controlling shareholders, "may be excluded [from] or restricted in their investment activities" on the basis of such findings; and that such findings "would be res judicata in any [future] proceeding brought . . . under Section 15(b) . . ." of the Securities Exchange Act. These considerations are even more weighty in the instant case because when Sloan & Co. was charged with its violations it was already a registered broker-dealer, not merely an applicant for registration, and his attempted withdrawal of the firm's registration occurred after the Commission's charges had been made against it.

C. The Petitioner Had a Fair Hearing.

1. Petitioner was provided adequate notice.

Petitioner states (Br. 14-15) that the Commission's order commencing public proceedings did not provide adequate notice of the allegations against petitioner because it "simply recites the language of various provisions of the Securities Exchange Act of 1934 and six rules promulgated thereunder and asserts in conclusory terms that these rules have been violated" (Br. 14-15). He claims that he was thereby deprived of his Fifth Amendment right to "notice and the opportunity for a hearing" (Br. 13).[31/]

Contrary to petitioner's assertions that he had "no actual knowledge of what specifically he was accused of doing" (Br. 16), we submit that

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31/ Mr. Sloan also claims, without elaboration, that he was somehow deprived of "his Sixth Amendment right to be informed of the nature and the cause of the accusations against him." The Sixth Amendment is applicable only to criminal prosecutions (Br. 13). The instant Commission administrative proceeding is, of course, not a criminal prosecution, as the petitioner concedes (Br. 13).

an examination of the order for proceedings will show (App. 14-16) that it was specific and detailed, both with respect to the nature of the alleged violations and the time periods during which the violative conduct occurred. It sets forth "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon it rests." Cf. Conley v. Gibson, 355 U.S. 41, 47 (1957).[32/]

Petitioner also claims that he was deprived of adequate notice of the "allegations" against petitioner because the Commission order, which revoked the broker-dealer registration of Sloan & Co. and barred Mr. Sloan from association with any broker or dealer, concerned itself with "many events which were not described in the order for public proceedings and which had not even occurred at the time of the administrative hearings in October and November of 1972" (Br. 13). He adds that he "did not know and could not know that these events would be considered . . ."

32/ In this regard, Mr. Sloan's reliance upon Jaffee & Company v. Securities and Exchange Commission, 446 F. 2d 387 (C.A. 2, 1971), is misplaced. In that case, this Court held, 446 F. 2d at 389, that "Jaffee & Co. was afforded inadequate notice that it would be disciplined derivatively on account of Jaffee's violations, rather than because of violations attributable directly to the Company," and accordingly set aside the Commission order disciplining Jaffee & Co. (emphasis added). Unlike the Jaffee case, where Jaffee & Co. had been sanctioned on the basis of Mr. Jaffee's personal violations of Rule 10b-6, 17 CFR 240.10b-6, which prohibits certain trading by persons interested in a distribution of securities, the violative conduct involved in the Commission's administrative proceeding is attributable directly to Sloan & Co.

Mr. Sloan's reliance upon Shemtob v. Shearson, Hammill & Co., 448 F. 2d 442, 444 (C.A. 2, 1971), and Segal v. Gordon, 467 F. 2d 602, 607 (C.A. 2, 1972), is also misplaced. Those decisions require that allegations of fraud be pleaded with particularity in accordance with Rule 9(b) of the Federal Rules of Civil Procedure. The instant proceeding involved no allegations that either Mr. Sloan or Sloan & Co. had engaged in fraudulent conduct.

(Br. 14) when the Commission rendered its decision. This claim is without merit. As noted above (pp. 12-13), the Commission surely could take notice of the fact that "the preliminary injunction on which this proceeding was initially based has now become permanent" (App. 55), and in determining the public interest the Commission properly considered a subsequent injunction that had been entered against petitioner after the Commission had already found the violations specifically alleged in the Order for Proceedings. See p. 13 n.10, supra.[33/]

2. There was no need for the hearing or initial review to be conducted by Article III judges, and there was no showing of bias on the part of the decisional officers.

Petitioner would have this Court upset over forty years of administrative law by requiring that the decision whether a person may remain registered as a broker-dealer be determined in the first instance by a judge appointed by the President and approved by the Congress, rather

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33/ Petitioner also asserts (Br. 5) that the Commission "stated that because of 'facts and circumstances before us that were unknown to and could not possibly have been foreseen by our staff' (A 56 n.24) that Sloan's broker-dealer registration would be revoked and that Sloan would be barred from being associated with any broker or dealer." The quoted language of the Commission occurred in a footnote explaining why a purported offer of settlement by the staff was not binding on the Commission. The statement quoted from appears in note 24 at App. 56:

> "Respondent says that he rejected a settlement calling for a 60-day suspension . . . prior to the hearings. But the asserted willingness of our staff to recommend that we accept a 60-day suspension for purposes of settlement . . . is irrelevant . . . . Here we have facts and circumstances before us that were unknown to and could not possibly have been foreseen by our staff at the time of the settlement talks" (emphasis added). (App. 56 n.24.)

than determined by the Commission, as provided in Section 15(b) of the Act. He would have this Court ignore the provisions of Section 4(b) of the Securities Exchange Act, 15 U.S.C. 78d(b), and of the Administrative Procedure Act, 5 U.S.C. §3105, authorizing the use of hearing examiners (Br. 106-107). Based on "what has recently been rumored in the financial press" (Br. 103), he would also have this Court hold that the Commission does not make objective decisions, but, instead, seeks "to vindicate their [staff's] authority and to back them up in a contested case" (Br. 103).

Petitioner also asserts "Administrative proceedings before the S.E.C. are well known to be kangaroo courts to anyone who has been involved with them" (Br. 102) and contends that "the risk of bias in this proceeding is too high to be constitutionally tolerable" (Br. 101). The very case that petitioner primarily relies upon in this connection, Withrow v. Larkin, 421 U.S. 35, 47 (1975), states, however, "that those who allege bias must overcome a presumption of honesty and integrity in those serving as adjudicators . . . ." As the Supreme Court declared in an earlier case, United States v. Morgan, 313 U.S. 409, 421 (1941), the law presumes that public officials "charged . . . with adjudicatory functions . . . [are persons] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." Mr. Sloan's conclusory assertions do not even begin to meet his burden of overcoming this presumption. We submit that an examination of the record of this proceeding nowhere suggests bias on the part of any of the decisional officers involved.

Petitioner refers (Br. 106) to Amos Treat & Co. v. Securities and Exchange Commission, 306 F. 2d 260 (C.A. D.C., 1962), stating that "there an administrative law judge was held to be disqualified." In fact, that case held that a member of the Commission, who had previously served as director of its Division of Corporation Finance, and had had certain contacts with matters involving Amos Treat & Co. in that capacity, was prohibited from participating in the "decisional process" in a broker-dealer revocation proceeding involving the firm. 306 F. 2d at 266. But see Securities and Exchange Commission v. R. A. Holman, 323 F. 2d 284, 286 (C.A. D.C., 1963), where on slightly different facts the same court reached a different conclusion. The Holman case also stated, 323 F. 2d at 287:

> "The party asserting disqualification must make his record in the administrative hearing . . . since he, of course, has the burden of proof."

Petitioner made no showing at the hearing, and does not point to any evidence here, to demonstrate that investigative, prosecutorial and decisional functions were not kept separate in the instant proceeding, Instead, without any substantiation, he describes in his brief to this Court (Br. 101) a conversation he allegedly overheard, after the evidentiary hearing, in which he claims the administrative law judge told the Commission staff members who testified that he found their testimony, rather than petitioner's, to be credible.

D. The Simultaneous Pendency of an Injunctive and an Administrative Proceeding against Petitioner Was Not Improper.

Petitioner also contends (Br. 106) that some unspecified constitutional question is involved here "because Sloan has been judged twice,"

first in the Commission's district court enforcement proceeding and thereafter in the instant administrative proceeding.

Section 15 (b) specifically gives the Commission power to revoke broker-dealer registrations and to bar persons from association with brokers and dealers. Section 21(e), 15 U.S.C.78u(e), authorizes the Commission to bring an action to enjoin violations. While the entry of an injunction protects the public from the repetition of the particular violations enjoined, it does not preclude those enjoined from continuing to engage in the securities business or from violating sections of the federal securities laws other than those specified in the injunctive order. A sanction imposed in an administrative proceeding can remove from the securities business, temporarily or permanently, those firms or individuals who by their prior actions have demonstrated that they are a danger to the public interest which the Securities Exchange Act seeks to protect. There was no reason for the Commission to wait until the injunctive action had been completed before bringing the administrative proceeding. Indeed, Section 15(b)(5)(C), 15 U.S.C. 78o(b)(5)(C), specifically makes a ground for an administrative sanction the fact that a broker or dealer "is permanently or temporarily enjoined by order, judgment or decree of any court of competent jurisdiction . . ." (emphasis supplied).[34/] If an administrative proceeding could not be conducted while an injunctive action was pending, Congress would not have specifically made a temporary injunction ground for sanction.

34/ A comparable provision is now in 15(b)(4)(C).

It has been held, moreover, that even where there has been a criminal proceeding that has "centered about the same matters" involved in both civil and administrative proceedings, there is no basis for challenge. United States v. Parrott, 315 F. Supp. 1012, 1015 (S.D. N.Y., 1969), affirmed without discussion on this issue, 425 F. 2d 972 (C.A. 2), certiorari denied. 400 U.S. 824 (1970). Judge Weinfeld there pointed out:

> "The Securities and Exchange Commission, where it believes the Securities Acts are being violated, is authorized, and indeed would be derelict if it failed, to investigate and to bring civil suit to enjoin alleged illicit activities. [Citations omitted.] The commencement of such proceedings, however, does not automatically immunize from criminal prosecution those who may be civilly restrained if the charged conduct also violates the criminal statues."

If the commencement of injunctive proceedings cannot immunize a defendant from criminal prosecution, surely it cannot immunize him from an administrative sanction.

CONCLUSION

For the foregoing reasons, the order of the Commission should be affirmed.

Respectfully submitted,

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